IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1476

MAX W. LYNCH,
Petitioner,
vs.
INDIANA STATE UNIVERSITY
BOARD OF TRUSTEES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

STEPHEN L. LUCAS
Attorney for Petitioner
859 Riverside Drive, Suite #9
Greenwood, Indiana 46142
Telephone: (317) 882-2010

C. E. Pauley & Co., Inc., Indianapolis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

MAX W. LYNCH,
Petitioner,
vs.
INDIANA STATE UNIVERSITY BOARD OF TRUSTEES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

Petitioner Max W. Lynch respectfully prays this Court issue a Writ of Certiorari to review the judgment of the Indiana Court of Appeals for the First District entered in Cause Number 1-877 A 189 on August 2, 1978, which affirmed the judgment of the Superior Court of Vigo County, Indiana, Division II.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals for the First District has been officially reported while the opinion of the Superior Court of Vigo County Indiana, Division II

has not. Copies of the two opinions issued have been appended hereto at pages A-1 and A-7.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3) and Rule 19 (1) (a) of this Court, to review an opinion of the Indiana Court of Appeals for the First District which has decided a federal question in a way in conflict with applicable decisions of this Court and the United States Constitution.

The denial of the Petitioner's Petition for Transfer to the Indiana Supreme Court was entered on January 12, 1979. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by Rule 22 (3) of this Court pursuant to 28 U.S.C. § 2101 (c).

QUESTION PRESENTED FOR REVIEW

Whether the decision of the Indiana Court of Appeals for the First District is in conflict with the decisions of both this Court and the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the following Constitutional provisions which are not set out verbatim.

The First Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This Petition arises from the affirmance by the Indiana Court of Appeals, First District of an award of summary judgment issued by the Superior Court of Vigo County,

Indiana, Division II, Lynch v. Indiana State University Board of Trustees, 378 N.E. 2d 900 (1978), which found that the Petitioner's dismissed as an assistant mathematics professor at the Laboratory School operated by the Respondents, for reading Bible verses aloud to his mathematics students did not violate his constitutional rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

On February 15, 1974, the Petitioner was dismissed by the Respondents as an assistant mathematics professor. Prior to that date the Petitioner had read Bible verses to his mathematics students, who were enrolled in the Laboratory School operated by the Respondents for high school students. The Petitioner had been informed on September 28, 1973, that reading Bible passages to his class was violative of University policy.

Notwithstanding the policy, Petitioner continued to read Bible verses until dismissal.

The Petitioner filed suit on February 11, 1976, in the Marion County, Indiana, Superior Court, Room number 7, for reinstatement and back pay. The cause was subsequently venued to the Vigo County, Indiana, Superior Court, Division II. That Court issued its Findings of Fact, Conclusions of Law and Judgment on March 30, 1977.

The Petitioner appealed to the Indiana Court of Appeals, First District, and on August 2, 1978, that Court affirmed the Judgment of the trial Court.

The Supreme Court of Indiana denied transfer on January 12, 1979.

REASONS FOR ALLOWANCE OF THE WRIT

The termination of the Petitioner's employment because of Bible reading amounts to a violation of his constitutional rights; that is, the right to the free exercise of his religious beliefs as guaranteed by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment to the United States Constitution.

Our Courts have long upheld the constitutional rights of the individuals in public schools. In the case of *Shelton* v. *Tucker,* 364 U.S. 479 (1960), this Court held:

> "By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, (t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools."

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, *Cantwell v. Connecticut,* 310 U.S. 296 (1940). Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins,* 367 U.S. 488 (1961); nor penalize nor discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island,* 345 U.S. 67 (1952).

Moreover, this Court held in *Perry v. Sindermann,* 408 U.S. 593 (1972), with regard to governmental benefits, that:

> "It (the government) may not deny a benefit to a person on a basis that infringes . . . constitutionally protected interests. . . ."

In *Torcaso v. Watkins,* it was noted that public positions cannot be withheld from persons because of their religious beliefs. In the case at bar, the Petitioner's compelling religious beliefs caused him to read his Bible to his mathematics class. No person was required to remain in the room. No prayer or religious service was held—the Bible was merely read.

Petitioner was never informed by Respondents that as a condition of employment he could not exercise a religious belief concerning Bible reading prior to his employment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the decision of the Indiana Court of Appeals for the First District.

Respectfully submitted,

Stephen L. Lucas
Attorney for Petitioner

859 Riverside Drive, Suite #9
Greenwood, Indiana 46142
Telephone: (317) 882-2010

APPENDIX

STATE OF INDIANA
VIGO SUPERIOR COURT

MAX W. LYNCH *vs* INDIANA STATE UNIVERSITY, INDIANA STATE UNIVERSITY BOARD OF TRUSTEES	No. S-C-76-755 Division 2

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause coming on to be heard upon the motion of defendant, Indiana State University ("University"), and defendant, Indiana State University Board of Trustees ("Trustees"), to dismiss the complaint of plaintiff, Max W. Lynch ("Lynch"), the parties having stipulated that said motion may be deemed as one for summary judgment under Indiana T.R. 56 and having further stipulated that for said purpose the well-pleaded facts and statements of the complaint and its attachments are taken as true; and based upon the various memoranda filed by the parties, and the Court, being duly advised in the premises, finds the facts and states its conclusions of law as follows:

Findings of Fact

1. Until February 15, 1974, Lynch was employed by the Trustees as an assistant professor of mathematics at the Laboratory School located in Terre Haute, Indiana.

2. The Laboratory School is a high school operated by the Trustees pursuant to their statutory powers.

3. That defendant, Indiana State University Board of Trustees, is a perpetual body corporate created by law

and is the duly constituted Board of Trustees of Indiana State University, an educational institution belonging to the State of Indiana and located in the City of Terre Haute, Vigo County, Indiana.

4. Lynch, during his employment as a mathematics professor, had a practice of reading Bible verses aloud to his mathematics students for several minutes at the beginning of the class hour.

5. In September, 1970, Lynch agreed to discontinue reading of Bible verses to his students during class time. The following circumstances preceded this agreement:

(a) On March 7, 1968, University employee Dr. Harley Lautenschlager confirmed by letter Lynch's agreement to refrain from discussing religion in his classes at the Laboratory School.

(b) On April 27, 1970, Lynch sent a letter to the University president stating that Lynch had a strong desire to read Bible passages to his students.

(c) By letter of May 13, 1970, the University Vice-President for Academic Affairs admonished Lynch to cease and desist from his practice of reading the Bible to his students at the beginning of each class hour.

(d) By letter of May 27, 1970, the University Dean of the School of Education further admonished Lynch to discontinue his practice of reading the Bible to his students at the beginning of each class hour.

(e) By letter of May 28, 1970, Lynch responded to the May 27, 1970 request, stating that he would refuse to comply with said request.

(f) On June 2, 1970, Lynch read aloud from the Bible to his class.

(g) On or about September 1, 1970, Lynch met with the University President regarding his practice of reading Bible verses to his class.

(h) By letter of September 4, 1970, the University President confirmed Lynch's agreement to refrain from Bible reading during class time.

6. By letter of September 21, 1973, Lynch informed the University President that he would be unable to continue further compliance with the aforesaid September, 1970 agreement. As a consequence, Lynch on September 28, 1973, was formally notified by the University that reading Bible passages to his class was violative of University policy.

7. On October 1, 1973, Lynch invited the assistant principal of the Laboratory School to attend his mathematics class, at which time he read aloud to his class several verses from the Bible.

8. On October 2, 1973, the University Dean of Education further admonished plaintiff, by letter, regarding the reading of Bible verses to his classes and informed him that his actions in this regard were unlawful and demanded that he desist from such practice immediately and permanently.

9. On October 2, 1973, following said admonition by the University Dean of Education regarding Bible reading, Lynch again requested the assistant principal of the Laboratory School to attend his mathematics class and again read Bible verses aloud to his students.

10. On October 4, 1973, members of the University Executive Committee met with Lynch regarding his reading of the Bible to his mathematics class, at which time Lynch stated his intention to continue to read aloud verses from the Bible to his classes. Lynch confirmed said intention by letter of October 4, 1973, to the University President.

11. On October 15, 1973, Lynch was informed that a hearing would be held by the Faculty Dismissal Hearing Committee in accord with Article 11 of the by-laws of the Faculty Constitution to consider Lynch's dismissal from the faculty as a result of his refusal to discontinue Bible readings to his classes. Lynch was advised that he could avoid a dismissal hearing by reconsidering his decision to read Bible verses to his classes. Lynch was further advised that he had the right to prepare and present a defense to the Faculty Dismissal Hearing Committee.

12. The Faculty Dismissal Hearing Committee met from time to time between October 16, 1973, and February 1, 1974. On February 1, 1974, said committee recommended the dismissal of Lynch from the faculty.

13. On February 5, 1974, Lynch requested consideration by the Trustees of his recommended dismissal. On February 15, 1974, the Trustees voted to affirm the dismissal of Lynch from the faculty based on his continued reading of Bible verses aloud to his mathematics classes.

14. Lynch would have continued to read Bible verses aloud to his mathematics students had the Trustees not dismissed him from the faculty.

Conclusions of Law

1. That this Court has jurisdiction over the parties and venue is proper.

2. The defendant, Indiana State University, is improperly named as a party defendant and, accordingly, the action against it must be dismissed.

3. The defendant Trustees were permitted by law to dismiss Lynch as an associate professor of mathematics at

the Laboratory School to prevent his reading aloud of Bible verses to his students. Lynch's readings from the Bible infringed the constitutional right of his students under the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution and Article I, Sections 2, 3 and 4, of the Constitution of the State of Indiana.

4. The Trustees had the legal right under I.C. 20-12-1-2 (b) and the United States and Indiana Constitutions, to decide to provide public educational programs which did not include the reading of Bible verses in mathematics classes. Accordingly, Lynch's dismissal, after refusal to discontinue such readings, was proper and legal.

5. Lynch, in accord with due process guarantees under the United States and Indiana Constitutions, was provided with the opportunity for a fair and impartial hearing pursuant to official University procedures. The procedure followed in dismissing Lynch from the faculty was proper and legal.

6. That plaintiff's dismissal as alleged in plaintiff's complaint did not violate plaintiff's constitutional rights guaranteed by the First and Fourteenth Amendments of the State of Indiana.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this order is a Final Judgment, all pending matters being disposed of, and that judgment be and the same hereby is entered for the defendant, Indiana State University, and the defendant, Indiana State University Board of Trustees, and against the plaintiff, Max W. Lynch.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that no costs or attorney's fees are awarded, each party bearing its own costs and attorneys' fees.

SO ORDERED, this 30th day of March, 1977.

Charles K. McCRORY, Judge

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

MAX W. LYNCH,
Plaintiff-Appellant,
-v-
INDIANA STATE UNIVERSITY
BOARD OF TRUSTEES,
Defendant-Appellees.

No. 1-877-A-189

APPEAL FROM THE SUPERIOR COURT OF VIGO COUNTY, DIVISION II

The Honorable Charles K. McCrory, Judge

LYBROOK, P.J. Plaintiff-appellant Max W. Lynch (Lynch) brings this appeal from an adverse judgment in his action seeking reinstatement as an associate professor of mathematics at Indiana State University (I.S.U.). Lynch was terminated by the I.S.U. Board of Trustees as a result of his practice of reading aloud from the Bible at the beginning of each of his classes.[1] Lynch gave his students the opportunity to leave the room if they did not wish to hear the readings. Repeated efforts by I.S.U. to reach a mutually acceptable agreement concerning Lynch's Bible reading were unsuccessful and dismissal procedures were instigated. Lynch was thereafter dismissed from I.S.U.'s employ on February 18, 1974, and he then brought this action

[1] Lynch was employed by the University to teach high school mathematics at the University Laboratory School in Terre Haute.

in the Superior Court of Marion County, which was subsequently venued to the Superior Court of Vigo County, contending that he was wrongfully discharged in violation of his constitutional right to free exercise of his religion.

I.S.U. filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (Indiana Rules of Procedure, Trial Rule 12(B)(6)), which was treated by the trial court as a Motion for Summary Judgment pursuant to TR. 12(B) and TR. 56. From the granting of summary judgment in favor of I.S.U., Lynch brings this appeal.

On appeal, Lynch asserts that the trial court erred in granting summary judgment, in that:

(1) The decision of the trial court is contrary to law in that Lynch's Bible reading was not in violation of his student's constitutional rights.

(2) The decision of the trial court is contrary to law in that Lynch's dismissal violated his constitutional rights under the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Sections 2 and 3 of the Indiana Constitution.

It is well established that this court, when reviewing the granting of summary judgment, must determine if any genuine issue of fact exists, and whether the law was correctly applied by the trial court. *Hale v. Peabody Coal Company* (1976), — Ind. App. —, 343 N.E.2d 316; *Middleton Motors v. Ind. Dept. of State Revenue, Gross Income Tax Division* (1977), — Ind. App. —, 366 N.E.2d 226. The court will therefore consider all facts as alleged by the appellant to be true, and draw from those facts all reasonable inferences favorable to him. *Hale v. Peabody Coal Company, supra; Middleton Motors v. Ind. Dept. of State Revenue, supra.*

Under TR. 56(C), a summary judgment will be granted by the trial court where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Here, no genuine issues of material fact exists as both parties agree Lynch was employed to teach mathematics at the University Laboratory School at Terre Haute, which is operated by I.S.U. During the course of his employment, Lynch made a practice of reading Bible verses aloud to his mathematics students for several minutes at the beginning of each class hour. During several discussions between Lynch and I.S.U. officials, Lynch was admonished to cease his religious readings as the practice was violative of University policy and unlawful. At first Lynch agreed to discontinue the practice, but he subsequently informed I.S.U. officials that he intended to continue reading aloud from the Bible to his classes. I.S.U. advised Lynch that a Faculty Dismissal Hearing would be held to consider his dismissal, and that he had a right to prepare and present a defense. The Faculty Dismissal Hearing Committee recommended Lynch's dismissal, and Lynch requested consideration by the I.S.U. Board of Trustees, which voted to affirm Lynch's dismissal from the faculty.[2]

I.

Lynch claims that the trial court erred in finding that the reading of Bible verses, without comment, to his students was a violation of the students' constitutional rights. It is his contention that so long as his students were accorded the opportunity to absent themselves from the classroom

[2] Lynch does not claim that the procedure followed by I.S.U. in terminating his employment was insufficient or improperly conducted.

to avoid hearing the Bible reading, he has preserved or at least not infringed upon their rights.

Addressing an Illinois statute, which required religious instruction in the public schools, in the case of *McCollum v. Board of Education* (1948), 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, the United States Supreme Court noted:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

Justice Brennan, writing a concurring opinion in *Abington School District v. Schempp* (1963), 375 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, had the following comments on a provision allowing students to be "excused" from religious instruction:

> ". . . by requiring what is tantamount in the eyes of the teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request." (374 U.S. at 289-290, 83 S.Ct. at 1607).

For students in his mathematics classes, the indisputable effect of Lynch's Bible reading was the advancement or

promotion of Lynch's particular religious views and practices.[3] Peer pressure, fear of the teacher, concern about grades, and the alternative of standing outside the classroom in the hall, severely limit the freedom of a student to absent himself from class during a Bible reading. Additionally, Lynch's religious activity was being conducted while he was employed by the I.S.U. Board of Trustees, using public facilities, during class time.

We think that the alternative afforded Lynch's students to absent themselves from the classroom was not sufficient protection to their own constitutional rights in light of the supervisory position of control occupied by the teacher over student grading and conduct, coupled with peer pressure and disapproval which we feel would have a "chilling" effect at best and more likely, a coercive impact on the student's free exercise of their religious rights.

II.

Next, Lynch asserts that the trial court's decision is contrary to law in that Lynch's dismissal violated his constitutional rights under the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Sections 2 and 3 of the Indiana Constitution.

---

[3] There is no dispute that the daily readings engaged in by Lynch were a religious activity. As the U.S. Supreme Court said in *Abington Township v. Schempp, supra*:

> "The daily reading of [Bible] verses even without comment possesses a devotional and religious character and constitutes in effect, a religious observance."

More recently in *Goodwin v. Cross County School District No. 7* (E.D. Ark. 1973), 394 F. Supp. 417,

> "As to the religious character of the practice, there is no dispute. The defendants make no claim that the Bible is not an instrument of religion. The reading of verses from the Bible and recitation of the Lord's prayer is a ceremony of religious character which cannot be gainsaid."

Lynch argues that I.S.U. has adopted a policy which is hostile to the free exercise of his religion in an area which is not proscribed by the Constitutions of the United States and the State of Indiana, thereby depriving Lynch of his employment based upon his religious beliefs.

Lynch cites *Torcaso v. Watkins* (1961), 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982, for the proposition that public positions cannot be withheld from persons because of their religious beliefs.[4] Here, I.S.U. maintains that Lynch was not discharged because of his religious beliefs but only for his refusal to cease the religious act of oral Bible reading during school time.

It is Lynch's contention that he is compelled by his religious beliefs to read from his Bible in mathematics class. He asserts that he was never informed that as a condition of his employment he could not exercise his beliefs, but was informed he could not read his Bible only subsequent to his employment.

The First Amendment to the U.S. Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The guarantees of the First Amendment have been extended and made applicable to the States by way of the Fourteenth Amendment. *Cantwell v. Connecticut* (1940), 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.2d 1213.

The Indiana Constitution provides in Article 1:

> "§ 2. *Right to Worship*—All men shall be secured to their natural right to worship Almighty God according to the dictates of their own consciences.

[4] In *Torcaso*, a Maryland law was struck down because is required notary publics to sign an oath affirming belief in God.

> § 3. *Freedom of Thought*—No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.
>
> § 4. *No preference to any creed*—No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

Lynch claims that the termination of his employment as a school teacher by I.S.U. violated the First and Fourteenth Amendments by denying him free exercise of his religious beliefs where such exercise did not violate the rights of others.

The distinction between the extent of the First Amendment protection afforded religious *acts,* as opposed to *beliefs,* was made by Justice Roberts in the following widely quoted statement from *Cantwell v. Connecticut, supra*:

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship . . . On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.* In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous

and absolute restraint would violate the terms of the guarantee. *It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.*" (Emphasis added, 310 U.S. 303-304).

In the cases of *School District of Abington Township v. Schempp* and *Murray v. Catlett, supra,* and *Engel v. Vitale* (1962), 370 U.S. 421, the U.S. Supreme Court held that the Establishment Clause of the First Amendment was violated by schools which engaged in daily Bible readings or prayer recitations, notwithstanding the fact that students who objected to the readings or prayers could be excused from their classrooms during the exercises. A fundamental holding of these and other Establishment Clause cases is the Supreme Court's recognition that the imposition of a limitation upon an individual's act or exercise of religious expression in a public school is not an infringement upon his right to hold his religious beliefs. The United States Supreme Court's decisions prohibiting regular Bible readings or prayers in schools did not affect the beliefs of the students, teachers and parents, who desired those religious exercises. The Court's decisions merely limited the times and places for conduct expressing those beliefs.

In the companion cases of *Jones v. City of Opelika, Bowden v. City of Fort Smith, Ark.,* and *Johin v. State of Arizona* (1942), 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691, (vacated on other grounds, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1691), Justice Reed wrote for the U.S. Supreme Court:

"One man, with views contrary to the rest of his compatriots, is entitled to the privilege of expressing his ideas by speech or broadside to anyone willing to listen or to read. Too many settled beliefs have in time been rejected to justify this generation in refusing a hearing to its own dissentients. *But that hearing may be limited by action of the proper legislative body to times, places and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order.*

This means that the proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism, any more than the civil authorities may hamper or suppress the public dissemination of facts and principles by the people. The ordinary requirements of civilized life compel this adjustment of interests." (Emphasis added).

In order for the State to interfere with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a State interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. *Wisconsin v. Yoder* (1972), 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15.

To allow Lynch to exercise his freedom to act, here, in reading the Bible aloud to his students would impinge upon his students' freedom to believe as they wish. Under the rule in *Cantwell,* which was reaffirmed in *Torcaso,* the concept of freedom to believe is an absolute right, and the freedom to act, in the nature of things, cannot be absolute. Thus when the exercise of his religious acts impinges upon the rights of his students to believe, then Lynch's rights must fall. A man cannot extend his religious freedom until

it infringes upon another person's civil rights or constitutional liberties. The right to worship is not a right to disturb others in their worship.

Lynch was not discharged from I.S.U.'s employment because of his religious beliefs, but was terminated because of his activities of reading aloud from the Bible before each of his mathematics classes. Lynch was not deprived of his right to read aloud from the Bible before and after school at his home, in church and with friends. The record shows that I.S.U. advised Lynch that he must not consume the limited and valuable classroom time available for teaching mathematics by reading the Bible. This I.S.U. unquestionably had the right to do in order for the University to maintain religious neutrality and promote secular education.

IC 1971, 20-12-1-2, enumerates the powers of the boards of trustees of the universities of the State of Indiana, which include the power and duty:

> "(a) To govern the disposition and method and purpose of use of the property owned, used or occupied by the institution, including the governance of travel over and the assembly upon such property;
>
> (b) *To govern, by specific regulation and other lawful means, the conduct of students, faculty, employees and others while upon the property owned by or used or occupied by the institution;*
>
> (c) *To govern, by lawful means, the conduct of its students, faculty and employees, wherever such conduct might occur, to the end of preventing unlawful or objectionable acts which seriously threaten the ability of the institution to maintain its facilities available for performance of its educational activities* or which are in violation of the reasonable rules and standards of the institution designed to protect

> the academic community from unlawful conduct or conduct which presents a serious threat to person or property of the academic community;
>
> (d) To dismiss, suspend or otherwise punish any student, faculty member or employee of the institution who violates the institution's rules or standards of conduct, after determination of guilt by lawful proceedings;
>
> • • •
>
> (g) To prescribe the curricula and courses of study offered by the institution and to define the standards of proficiency and satisfaction within such curricula and courses;. . . ." (Emphasis added).

Pursuant to the statutory exercise of power to specify curriculum in the schools and to regulate the conduct of the faculty, the I.S.U. officials and Board of Trustees first employed Lynch to teach mathematics and subsequently dismissed him from the faculty.

In *Stein v. Oshinsky* and *Rubin v. Board of Regents,* companion cases decided in 1965 by the U.S. Court of Appeals, Second Circuit, (1965), 348 F.2d 999, Judge Friendly considered the defendants' proposition that the First Amendment would not prohibit the school authorities from permitting student initiated prayers, saying:

> "Nevertheless New York is not bound to allow them unless the Free Exercise Clause or the guarantee of freedom of speech of the First Amendment compels.
>
> Neither provision requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire. *Poulos v. State of New Hampshire,* 345 U.S. 395, 405, 73 S.Ct. 760, 97 L.Ed. 1105 (1953), It would scarcely be argued that a court had to suffer a trial or an argu-

ment to be interrupted any time that spectators—or even witnesses or jurymen—desired to indulge in collective oral prayer. The case of the school children differs from that of spectators—although not from that of witnesses or jurymen—in that, so long as they choose to attend a public school, attendance on their part is compulsory. N.Y. Education Law, Consol. Laws, c. 16, §§ 3201-3229. But '[t]he student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others.' *Abington Tp. School District v. Schempp, supra,* 374 U.S. at 299, 83 S.Ct. at 1612 (Concurring opinion of Mr. Justice Brennan). . . .

Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children 'be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms,' the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough; and the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce. The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three; their action presented no such inexorable conflict with deeply held religious belief as in *Sherber v. Verner,* supra. After all that the states have been told about keeping the 'wall between church and state * * * high and impregnable,' *Everson v. Board of Education,* 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947), it would be rather bitter irony to chastise New York for having built the wall too tall and too strong." (Emphasis added).

Lynch's contention that the First and Fourteenth Amendments proscribe only *legislation* in respect to religion must also fall, as the Federal Courts have interpreted their language to forbid voluntary student initiated prayers and Bible readings even in the absence of state statutes or regulation. See *American Civil Liberties Union v. Gallatin Area School District* (W.D.Pa. 1969, 307 F. Supp., 637), where the resolution of a school board authorizing Bible reading and encouraging group recitation of the Lord's Prayer, was held to be the act of a political subdivision of a state government and hence violative of the Establishment Clause. Later in *Goodwin v. Cross County School District No. 7* (E.D. Ark. 1973), 394 F.Supp. 417, the Federal Court considered three religious activities challenged by petitioner Goodwin. While it upheld the participation of local clergy in baccalaureate services because such services were not held on a school day nor was student attendance required, the Court found that a voluntary, student initiated program of Bible reading and recitation of the Lord's Prayer along with a program for distribution of Gideon Bibles in the school system, were clearly of religious character violative of the Establishment Clause where the programs used tax-supported facilities and took advantage of compulsory public school attendance, all with the permission of school authorities.

For the State of Indiana or I.S.U. to have ordered Lynch or his students to participate in religious activities would clearly have violated the Establishment Clause of the U.S. Constitution's First Amendment, as well as Article 1, § 2 of the Indiana Constitution, both set out above. The oft-quoted admonition from *Everson v. Board of Education* (1947), 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, bears repeating:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities, or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' (330 U.S. at 15-16, 67 S.Ct. at 511-512). . . ."

The U.S. Supreme Court again reaffirmed its position in *Epperson v. Arkansas* (1968), 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed. 228, where Justice Fortas wrote:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." 393 U.S. at 104, 89 S.Ct. 270.

The Establishment Clause, then, stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, even-

handed in operation, and neutral in primary impact. *Abington School District v. Schempp, supra; Gillette v. U.S.* (1971), 401 U.S. 437, 91 S.Ct. 828.

While the State has not directly participated in the act of Bible reading by Lynch, it placed him in the position of authority from which he might express his religious views during a part of the curricular day, involving young people whose preesnce is compelled by law, hence utilizing the prestige, power, and influence of school authority.

Thus had I.S.U. permitted Lynch to continue the Bible readings, it would have violated its religious neutrality mandated by the Establishment Clause of the First Amendment, allowed infringement upon the religious freedoms of its students, and failed to promote the secular goal of instruction in mathematics for which Lynch was employed. The I.S.U. Board of Trustees was justified in acting, pursuant to IC 1971, 20-12-1-2, to discharge Lynch after his refusal to cease his religious activities in the classroom.

Finding no genuine issue of fact, we affirm the trial court's award of summary judgment in favor of I.S.U.

Affirmed.

Buchanan, C.J., participating by designation, concurs; Lowdermilk, J., concurs.

STATE OF INDIANA

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

Marjorie H. O'Laughlin, Clerk
217 State House
Indianapolis, 46204
Telephone 633-5200

MAX W. LYNCH
v.
INDIANA STATE UNIVERSITY
BOARD OF TRUSTEES

No. 1-877A189

You are hereby notified that the Supreme Court has on this day Appellant's Petition for Transfer is hereby DENIED.

Givan, C.J.

All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 12th day of January, 1979.

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

No. 78-1476

In the Supreme Court of the United States

OCTOBER TERM, 1978

MAX W. LYNCH,

Petitioner,

vs.

INDIANA STATE UNIVERSITY BOARD OF TRUSTEES,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. KLUCHIN
5720 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
Attorney for Respondent

Of Counsel:
KARON, MORRISON & SAVIKAS, LTD.
5720 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 876-6000

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1476

MAX W. LYNCH,

Petitioner,

vs.

INDIANA STATE UNIVERSITY BOARD OF TRUSTEES,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Indiana Court of Appeals for the First District that affirmed the judgment of the Superior Court of Vigo County, Indiana, Division II, is reported at 378 N.E.2d 900; App. 7-A.* The Superior Court's opinion and the order denying Petitioner's Petition for Transfer to the Indiana Supreme Court are not reported but are set forth in the Appendix to the Petition. (App. 1-A and 22-A, respectively)

* References to the Appendix to the Petition shall be "App. .....".

JURISDICTION

The jurisdictional requisites to consider the Petition are set forth therein.

CONSTITUTIONAL PROVISIONS INVOLVED

A. The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

B. The Fourteenth Amendment to the United States Constitution, which makes the First Amendment applicable to the states, provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether certiorari is appropriate to review the decision of the Indiana Court of Appeals which applied the well settled standards mandating religious neutrality by the states and permitting the regulation of religious acts, as opposed to beliefs, in ruling that Petitioner's employment as a public high school teacher was properly terminated by Respondent after Petitioner refused to forbear from reading the Bible aloud in his mathematics class.

STATEMENT OF THE CASE

Material Facts

Until February 15, 1974, Petitioner was employed by Indiana State University as an assistant professor of mathematics in the University Laboratory School in Terre Haute, Indiana. During his employment, Petitioner commenced a practice of reading Bible verses aloud to his mathematics students for several minutes at the beginning of each class. After agreeing in September, 1970, to discontinue his reading of Bible verses, Petitioner informed the University President by letter of September 21, 1973, that he intended to recommence reading aloud from the Bible in his classes. Thereafter, Petitioner was formally notified by the University that his Bible reading violated University policy.

On October 4, 1973, the University Executive Committee met with Petitioner, at which time Petitioner stated his intention to continue to read Bible verses aloud to his classes and confirmed this intention by letter to the University President. On October 15, 1973, Petitioner was informed that a hearing would be held by the Faculty Dismissal Hearing Committee to discuss the Petitioner's termination. Subsequently, on February 1, 1974, that Committee recommended the dismissal of Petitioner from the faculty. On February 15, 1974, Respondent, Indiana State University Board of Trustees, voted to affirm the dismissal of Petitioner from the faculty based upon his refusal to forbear from reading Bible verses aloud to his classes. Petitioner has never claimed that the termination procedure followed by Respondent or Indiana State University was insufficient or improperly conducted.

Proceedings Below

Petitioner filed suit on February 11, 1976, in the Marion County, Indiana, Superior Court for reinstatement and back pay. The cause was later transferred to the Vigo County, Indiana, Superior Court, Division II. That Court rendered summary judgment in favor of Respondent and issued its Findings of Fact and Conclusions of Law on March 30, 1977. (App. 1-A)

Petitioner appealed to the Indiana Court of Appeals, First District. On August 2, 1978, in a unanimous decision, that Court affirmed the judgment of the trial court that Respondent was justified in discharging Petitioner after his refusal to cease his religious activities in the classroom. (App. 7-A)

The Supreme Court of Indiana denied Petitioner's Petition to Transfer on January 12, 1979 in an order in which all justices concurred. (App. 22-A)

ARGUMENT

THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS HAVE NOT BEEN VIOLATED.

A. Petitioner Fails to Present an Appropriate Case for Reviewing the Well-Settled Distinction Between Religious Beliefs and Religious Acts.

The Court of Appeals of Indiana carefully considered the uncontested facts in this case and thoroughly reviewed the controlling decisions of this Court construing the Establishment and Free Exercise Clauses of the First Amendment. Its decision is completely in accord with applicable decisions of this Court.

In its opinion, the Indiana Court expressly and correctly refuted the contention that Respondent's termination of Petitioner's employment constituted an infringement of Petitioner's freedom of religious beliefs. That Court stated:

> "Lynch claims that the termination of his employment as a school teacher by I.S.U. violated the First and Fourteenth Amendments by denying him free exercise of his religious beliefs where such exercise did not violate the rights of others.
>
> "The distinction between the extent of the First Amendment protection afforded religious *acts*, as opposed to *beliefs*, was made by Justice Roberts in the following widely quoted statement from *Cantwell* v. *Connecticut*, [310 U.S. 296 (1940)]:

'The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship . . . On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.* In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. *It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.*' (Emphasis added, 310 U.S. 303-304, 60 S.Ct. 903).

"In the cases of *School District of Abington Township* v. *Schempp* and *Murray* v. *Curlett, supra,* and *Engel* v. *Vitale* (1962), 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, the U.S. Supreme Court held that the Establishment Clause of the First Amendment was violated by schools which engaged in daily Bible readings or prayer recitations, notwithstanding the fact that students who objected to the readings or prayers could be excused from their classrooms during the exercises. A fundamental holding of these and other Establishment Clause cases is the Supreme Court's recognition that the imposition of a limitation

upon an individual's act or exercise of religious expression in a public school is not an infringement upon his right to hold his religious beliefs. The United States Supreme Court's decisions prohibiting regular Bible readings or prayers in schools did not affect the beliefs of the students, teachers and parents, who desired those religious exercises. The Court's decisions merely limited the times and places for conduct expressing those beliefs.

• • •

"To allow Lynch to exercise his freedom to act, here, in reading the Bible aloud to his students would impinge upon his students' freedom to believe as they wish. Under the rule in *Cantwell,* which was reaffirmed in *Torcaso,* the concept of freedom to believe is an absolute right, and the freedom to act, in the nature of things, cannot be absolute. Thus when the exercise of his religious acts impinges upon the rights of his students to believe, then Lynch's rights must fall. A man cannot extend his religious freedom until it infringes upon another person's civil rights or constitutional liberties. The right to worship is not a right to disturb others in their worship.

"Lynch was not discharged from I.S.U.'s employment because of his religious beliefs, but was terminated because of his activities of reading aloud from the Bible before each of his mathematics classes. Lynch was not deprived of his right to read aloud from the Bible before and after school at his home, in church and with friends. The record shows that I.S.U. advised Lynch that he must not consume the limited and valuable classroom time available for teaching mathematics by reading the Bible. This I.S.U. unquestionably had the right to do in order for the University to maintain religious neutrality and promote secular education."

(378 N.E.2d at 904-906; App. 13-A to 16-A)

Scrutiny of the decisions of this Court cited and discussed by Petitioner at pages 4 and 5 of the Petition dis-

close that Petitioner erroneously interprets and misapplies those decisions.

Petitioner relies heavily upon the decision in *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), which he cites for the proposition that public positions cannot be withheld from persons because of religious beliefs. That case involved a Maryland law requiring that each public office holder sign an oath declaring a *belief* in the existence of God. Respondent did not discharge Petitioner for the substance of his beliefs (which notably are not identified in the record and are not relevant hereto), or for his non-belief. Petitioner was discharged by Respondent for his refusal to forbear from the religious *act* of Bible reading in class. Accordingly, Petitioner's reliance upon *Torcaso* is misplaced.

Similarly, *Shelton* v. *Tucker,* 364 U.S. 479 (1960), is not relevant to Petitioner's case. *Shelton* held that an Arkansas statute requiring teachers to disclose to school officials all of their organizational relationships violated the First Amendment's guarantee of freedom of association. It did not involve a state's prohibiting religious conduct by a school teacher during classroom time on a public school's premises. To the contrary, *Shelton* held that Arkansas's concern with each and every activity and association of its public school teachers *outside* of school and during *non-teaching* hours was beyond that state's legitimate concern about those teachers' occupational competence and their activities during school.

Petitioner's reference to *Perry* v. *Sindermann,* 408 U.S. 593 (1972) is also inapposite. That opinion involved First Amendment rights to free speech unrelated to religion, as well as the question of the procedural due process to be afforded to a terminated teacher with *de facto* tenure. *Perry* is clearly distinguishable from the case at bar where Petitioner (i) contends his right to freedom of religious belief has been infringed and (ii) has not challenged the trial court's conclusion that he was provided with the opportunity for a fair and impartial hearing pursuant to University procedures and in compliance with due process guarantees under the United States Constitution. (App. 5-A; 378 N.E.2d at 902, n. 2 and App. 9-A, n. 2)

The facts and issues presented by Petitioner's case are well within the ambit of those considered by this Court in *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963) and *Engel* v. *Vitale,* 370 U.S. 421 (1962). Those opinions delineated the reach of the Establishment Clause and the limitations of the Free Exercise Clause in holding that Bible reading and non-denominational prayers are not permissible in public schools. Those opinions of this Court conclusively support the unanimous rulings in favor of Respondent in all of the proceedings below. Therefore, the granting of certiorari would only result in affirmance of the ruling of the Indiana Court of Appeals.

B. Petitioner Fails to Present an Appropriate Case for Reviewing the Well-Settled Standards for Maintaining Religious Neutrality.

The Establishment Clause of the First Amendment "[e]rected a wall between church and state" which must be kept "high and impregnable". *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947). As Justice Fortas later wrote in *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968), quoted by the Indiana Court of Appeals at 378 N.E.2d 907-908 (App. 20-A):

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or

to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." 393 U.S. at 104, 89 S.Ct. at 270

Petitioner contends that since his students could voluntarily leave the classroom during his Bible reading, there could have been no infringement upon their First Amendment rights. That contention was considered and rejected by the Court of Appeals in accordance with prior conclusions of this Court:

> "Justice Brennan, writing a concurring opinion in *Abington School District* v. *Schempp,* (1963), 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, had the following comments on a provision allowing students to be 'excused' from religious instruction:
>
> > '. . . by requiring what is tantamount in the eyes of the teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request. (374 U.S. at 289-290, 83 S.Ct. at 1607).'
>
> "For students in his mathematics classes, the indisputable effect of Lynch's Bible reading was the advancement or promotion of Lynch's particular religious views and practices. Peer pressure, fear of the

> teacher, concern about grades, and the alternative of standing outside the classroom in the hall, severely limit the freedom of a student to absent himself from class during a Bible reading. Additionally, Lynch's religious activity was being conducted while he was employed by the I.S.U. Board of Trustees, using public facilities, during class time.
>
> "We think that the alternative afforded Lynch's students to absent themselves from the classroom was not sufficient protection to their own constitutional rights in light of the supervisory position of control occupied by the teacher over student grading and conduct, coupled with peer pressure and disapproval which we feel would have a 'chilling' effect at best and more likely, a coercive impact on the student's free exercise of their religious right." (378 N.E.2d at 903; App. 10-A to 11-A)

The Indiana Court of Appeals held on the basis of this Court's decision in *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963), that there was no dispute that Petitioner's daily Bible readings were a religious activity (378 N.E. 2d at 903, n. 3; App. 11-A, n. 3). Consequently, that Court applied the two-pronged test announced in *Abington Township*:

> ". . . The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion . . ." (374 U.S. 203 at 222)

The Indiana Court's proper application of the above-quoted test is apparent from its concluding remarks:

> "The Establishment Clause, then, stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. *Abington School District* v. *Schempp, supra; Gillette* v. *U.S.* (1971), 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168.
>
> "While the State has not directly participated in the act of Bible reading by Lynch, it placed him in the position of authority from which he might express his religious views during a part of the curricular day, involving young people whose presence is compelled by law, hence utilizing the prestige, power, and influence of school authority.
>
> "Thus had I.S.U. permitted Lynch to continue the Bible readings, it would have violated its religious neutrality mandated by the Establishment Clause of the First Amendment, allowed infringement upon the religious freedoms of its students, and failed to promote the secular goal of instruction in mathematics for which Lynch was employed."

(378 N.E.2d at 908; App. 20-A to 21-A)

Respondent unquestionably had the duty, pursuant to the decisions of this Court, to require Petitioner to forbear from his religious activities in order for Respondent to maintain religious neutrality and promote secular education.*

---

* Surely, the Respondent's actions to maintain religious neutrality and promote the equal treatment of all students, faculty, and religions by prohibiting Petitioner's Bible reading are distinguishable from the situation in *Fowler* v. *State of Rhode Island,* 345 U.S. 67 (1953), cited by Petitioner at page 4 of the Petition. There, the State of Rhode Island, in violation of the Equal Protection Clause of the Fourteenth Amendment, blatantly denied Jehovah's Witnesses the right to use a public park that was open to all other religious groups.

CONCLUSION

For the foregoing reasons, Respondent submits that the Court of Appeals of Indiana, First District, has decided the constitutional questions raised by Petitioner in complete accord with the applicable decisions of this Court. Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

ROBERT M. KLUCHIN

Attorney for Respondent

Of Counsel:
KARON, MORRISON & SAVIKAS, LTD.